

**Office of
The City Attorney
City of San Diego**

MEMORANDUM

DATE: November 20, 2007

TO: Honorable Council President Scott Peters and Members of the City Council

FROM: Michael J. Aguirre, City Attorney

SUBJECT: Mayor's Strategy for Accessing the Capital Markets

The City Attorney has reviewed the Mayor's Memorandum of November 19, 2007 in which he outlines his purported plan to access the public capital markets. The City Attorney also desires to bring the City current with respect to all of its financial statements and to access the public capital markets as soon as practicable. However, the City Attorney is obligated to ensure that the information presented to the capital markets is credible, reliable and reflects a complete understanding of the City's financial health.

The City of San Diego continues to face pension and retiree health liabilities estimated at over \$2 billion. These liabilities threaten the fiscal health of the City. To date, the Mayor has not developed a credible financial plan of revenue enhancements, service cuts and benefit roll backs to meet these challenges. Indeed the Securities and Exchange Commission sanctioned the City for violating the anti-fraud provision of the Securities Act of 1933 and the Securities Exchange Act of 1934 in connection with disclosure regarding the City's financial statements, including specifically information about the future fiscal burdens of the City's retirement system.

The Mayor's memorandum fails to address the issues raised in the letter of the City Attorney dated November 14, 2007 and Interim Report No. 22, dated November 14, 2007 entitled "Pension Plan's Violations of Internal Revenue Code 415(b)—Excess Benefits," which raised concerns regarding the accuracy of the information regarding the Preservation of Benefits Retirement Plan (POB Plan). Interim Report No. 22 demonstrates that the information regarding the illegal payment of excess retirement benefits was mischaracterized and underreported in the FY 2005 CAFR, and as a consequence the FY 2005 CAFR may need to be restated. The issues raised by the illegal payment of excess retirement benefits make clear that (i) the City, even at this late date, does not have the complete picture regarding the fiscal burdens of its retirement system and (ii) the financial information from SDCERS is unreliable. These issues suggest that the City proceed with deliberation and due caution.

The Mayor's memorandum completely glosses over a policy debate that must take place: whether to re-access the public capital markets with unaudited financial information. The Mayor assumes that we can access the public capital markets when the City completes its FY 2006 CAFR and Standard & Poor's reestablishes a rating on the City's bonds. However, by the time this is accomplished the City could be fully 10 months past the end of the end of Fiscal Year 2007---a period when public issuers would normally have completed FY 2007 financial statements. A critical question is whether it is advisable and a best financial practice, given the City's recent history, to re-enter the public capital markets without current financial information. The City Attorney is not aware that this public debate has taken place, and that the public understand the costs associated with this strategy. The Mayor's memorandum does not address this point.

The City's Disclosure Practice Working Group Controls and Procedures sets out a 270-day period to complete an offering document. By its very terms this is intended to be overly cautious and deliberate, with an eye toward checking and rechecking the information that would reach the financial markets.

The City Attorney fully intends to continue to cooperate with the Mayor's Office to pursue prudent financings. But given the continued questions being raised regarding the City's retirement plan and the reliability of information from SDCERS, the City Attorney believes that the rush by the Mayor to the capital markets simply to keep a campaign promise is unsound.

MICHAEL J. AGUIRRE, City Attorney

By

Michael J. Aguirre
City Attorney

MJA:jdf

cc: Honorable Mayor
Andrea Tevlin, Independent Budget Analyst